No doubt the holding in the principal case would be justifiable, were considerations of business and expediency alone allowed to govern, and it might be wise to amend the Act to expressly so provide, but it is difficult to see how the exercise of such power is justified under the present language of the Act and the decisions of the courts.

It would seem that the same considerations should apply to receiverships under state law. For, though it is settled that all state bankruptcy laws are suspended upon the adoption of a national bankruptcy act, yet state laws providing for receiverships do not always amount to bankruptcy acts, and hence are not suspended by the National Bankruptcy Act.[17] But upon an adjudication in bankruptcy, the title of the state court receiver is nullified, and the bankruptcy court may secure the possession of the debtor's property by obtaining an order from the state court on the receiver to surrender the property.[18] This case and the case of general assignments constitute one of the exceptions to the rule of comity that the court which first obtains jurisdiction retains it throughout. But the receivership is not nullified by the filing of the petition, but by the adjudication, hence it would seem that the bankruptcy court could not remove the receiver before adjudication. And furthermore, since the bankruptcy courts are extremely careful to observe the rules of comity between themselves and the state courts, in doubtful cases the jurisdiction of the state courts would probably be upheld. And this must *a fortiori* be true, when the state officer is acting under a valid state law, whereas the bankruptcy court is not acting under the Bankruptcy Act, since the essential fact to give it jurisdiction—the adjudication—has not yet occurred.

RAISED CHECKS.—The rule that a written instrument is invalidated by any material alteration without the consent of the party sought to be charged thereon is now universally recognized and applies to all written instruments. The rule seems to have originated in the old common law applicable to deeds. Since the deed itself was considered to be the contract of the parties and could not be contradicted by parol evidence, and since any unauthorized alteration of it destroyed the only evidence of the real agreement of the parties, such an alteration was held to invalidate the deed altogether.[1] Then this principle was extended to bills of exchange, and finally to all written instruments[2] This rule is based upon the principle that such an alteration changes the contract of

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[17] In re Watts, 190 U. S. 1, 10 A. B. R. 113; State ex rel. Strohl *v.* Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177.

[18] REMINGTON, BANKRUPTCY, §§ 1609, 1611.

[1] Henry Pigot's Case, 11 Co. Rep. 27.

[2] Angle *v.* Northwestern Ins. Co., 92 U. S. 330; Davidson *v.* Cooper, 11 M. & W. 778; Master *v.* Miller, 4 T. R. 320.

the parties and, in effect, makes a new contract; and, therefore, if the non-consenting party is held liable on the altered instrument, it will be on an agreement to which he has never assented.[3] And the original contract is not enforcible, for it would encourage fraud not to subject the forger to some penalty for his wrong.[4] Also, it is immaterial whether the alteration be for the benefit or to the detriment of the party to be charged, for in either case it is a contract to which he is not a party. Since a material alteration is a defense going to the very essence of the contract, denying its validity, it is a defense which may be asserted, even against the bona fide holder of a negotiable instrument.[5]

The authorities seem to be in accord in the case where the negotiable instrument is signed by the maker and delivered to some other person either wholly or partially unfilled. If the maker of a note signs it in blank and delivers it to an agent to fill up for some definite amount, he will be liable to the bona fide holder for any amount that the agent may fill out the note, even though the agent exceeds his authority.[6] Likewise, if the instrument is delivered only partially complete, it has often been held that the maker impliedly gives the authority to any person into whose hands the instrument may come to fill out the incomplete parts.[7]

But the case above mentioned where the instrument is delivered incomplete must be carefully distinguished from the case where the instrument is complete when it is delivered. Much of the conflict among the cases can be traced to a failure to observe this distinction. If the instrument is delivered complete with all blank spaces properly filled in, it is clear that any alteration without the maker's consent releases him. But there is conflict where the alteration is not in the nature of a mere addition, but is an entire change of some part of the instrument, as by erasure or the use of chemicals, and the substitution of different terms, if the maker by his negligence facilitated the alteration. On principle it would seem that the loss should fall on the holder, and not on the maker or drawer.[8]

The authorities are in direct conflict, however, in the case where the instrument is complete, but the maker has negligently left

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[3] Draper *v.* Wood, 112 Mass. 315.

[4] Gettysburg Nat. Bank *v.* Chisholm, 169 Pa. St. 564, 47 Am. St. Rep. 929.

[5] Greenfield Savings Bank *v.* Stowell, 123 Mass. 196, 25 Am. Rep. 67; Holmes *v.* Trumper, 22 Mich. 427, 7 Am. Rep. 66; Knoxville Nat. Bank *v.* Clarke, 51 Iowa 264, 1 N. W. 491, 33 Am. Rep. 129; Nat. Exchange Bank *v.* Lester, 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402.

[6] Van Duser *v.* Howe, 21 N. Y. 531; Angle *v.* Northwestern Ins. Co., *supra.*

[7] Redlich *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Yocum *v.* Smith, 63 Ill. 321, 14 Am. Rep. 120; Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. 907. 85 Am. St. Rep. 246; Rainbolt *v.* Eddy, 34 Iowa 440; Kitchen *v.* Place, 41 Barb. (N. Y.) 465.

[8] Lanier *v.* Clarke (Tex.), 133 S. W. 1093. *Contra,* Harvey *v.* Smith, 55 Ill. 224.

blank spaces, which render it an easy matter to increase the amount of the instrument by the addition of figures or words in front of the amount named in the instrument. One line of cases holds that a maker who leaves such blank spaces is liable to a bona fide holder, even though it has been altered in a material part. The grounds upon which these cases base their decisions are various.

Many of the cases holding this view have followed the early English case of *Young* v. *Grote*,[9] and have held the maker or drawer liable on the ground of estoppel.[10] But this case has practically been overruled in England,[11] and as a matter of fact estoppel was not the real ground of liability in that case, but the drawer was held liable rather on the ground that his negligence in leaving business matters to be attended to by his wife was the proximate cause of the wrong. It is difficult to see how the maker or drawer of a negotiable instrument estops himself from showing a forgery, simply because he facilitated it, any more than one who did not properly safe-guard his property would be estopped from showing a theft of it.[12]

The equitable maxim that as between two innocent parties, he should suffer who made the wrong possible, has been applied in some cases to fasten liability on the maker.[13] But is seems that this doctrine should be limited to the case where the wrong is caused by some third person acting as agent for the maker or drawer, either expressly or impliedly.[14]

Again, the maker's liability has been put on the ground that his negligence was the cause of the forgery.[15] The negligence of the maker is not the proximate cause of the wrong, but is merely a circumstance indirectly contributing to it.[16] The proximate cause of the forgery can only be the act of the forger. And there can be no negligence without the violation of a legal duty. The maker cannot be under a legal duty to use every known precaution to guard against the innumerable ways in which a forgery can be committed.

On principle and by the weight of authority, especially of the

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[9] 4 Bing. 253.

[10] Redlich *v.* Doll, *supra;* Halifax Union *v.* Wheelwright, L. R. 10 Ex. 183; Kitchen *v.* Place, *supra.*

[11] Swan *v.* N. B. Australasian Co., 2 H. & C. 175; Schofield *v.* Earl of Londesborough, (1896) A. C. 514; Colonial Bank *v.* Marshall, (1906) A. C. 559.

[12] Knoxville Nat. Bank *v.* Clarke, *supra.*

[13] Isnard *v.* Torres, 10 La. Ann. 103. See Rainbolt *v.* Eddy, *supra;* Redlich *v.* Doll, *supra.* This doctrine seems to be derived from the civil law.

[14] Burroughs *v.* Klunk, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; Holmes *v.* Trumper, *supra;* Knoxville Nat. Bank *v.* Clarke, *supra.*

[15] Halifax Union *v.* Wheelwright, *supra;* Merritt *v.* Boyden, *supra;* Yocum *v.* Smith, *supra;* Young *v.* Grote, *supra.*

[16] Worrell *v.* Gheen, 39 Pa. St. 388; Nat. Exchange Bank *v.* Lester, *supra;* Knoxville Nat. Bank *v.* Clarke, *supra;* Holmes *v.* Trumper, *supra.*

latest cases, the maker is not liable in such a case.[17] The purchaser of negotiable paper must, in this case, put his confidence in the good character of the one from whom he purchases, and rely on the contract of the endorser, i. e., his guarantee that the instrument is genuine. And regardless of the care that a good business man would exercise, such a degree of care is not required by the law, since negotiable instruments are in common use among all classes of people, whether in business or not.

Some of the cases draw a distinction between promissory notes and bills of exchange drawn on an individual and checks drawn on a deposit in bank. The acceptor of a bill of exchange is under no duty to accept the bill, nor is the purchaser of a note under a duty to buy, but the bank is under the duty to pay all checks drawn by one of its customers. The relation between a bank and its customer is that of debtor and creditor, arising by virtue of the bank's agreement to honor all genuine orders upon it by the customer. If the bank pays a check that is not genuine, it cannot charge it against the customer's account. But in some cases it has been held that the customer owes the bank the duty of exercising the care of ordinary business men in drawing checks upon it. Under this view if the customer draws the check negligently, he violates his duty to the bank and the bank is not liable.[18]

However, in this case, as in the case of other negotiable instruments, it seems that the drawer's negligence is not the real cause of the wrong and hence he should not suffer for it. In the recent case of *Commercial Bank* v. *Arden & Fraley* (Ky.), 197 S. W. 951, the plaintiffs were customers of the defendant bank. They drew certain checks on the bank, but negligently left blank spaces in front of the words and figures designating the amounts. The payee raised these checks by inserting higher amounts in the blank spaces, and presented them to the bank, whereupon they were paid. The Negotiable Instruments Law of Kentucky provided that if a negotiable instrument was materially altered, it might be enforced in the hands of a bona fide holder according to its original tenor. The court held that the plaintiffs were entitled to recover from the bank the difference between the amount of the check as altered and the original amount. The holding in the principal case seems sound, for it does not seem that the drawer of a check should be required to anticipate a crime any more than an innocent purchaser should be required to expect that a crime has been committed. Indeed, it seems more practicable to require the purchaser to ascertain the validity of the instrument from the original parties than to compel the maker to follow his

[17] Holmes *v.* Trumper, *supra;* Greenfield Savings Bank *v.* Stowell, *supra;* Knoxville Nat. Bank *v.* Clarke, *supra;* Nat. Exchange Bank *v.* Lester, *supra;* Schofield *v.* Earl of Londesborough, *supra;* Colonial Bank *v.* Marshall, *supra.*

[18] Timbel *v.* Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. Supp. 497; Young *v.* Grote, *supra.* See Holmes *v.* Trumper, *supra.* See also, DANIEL, NEG. INSTRUMENTS, 6 ed., § 1659.

paper through all the channels of commerce to protect it from alteration and forgery. And the relation of bank and customer does not ordinarily create any duty on the part of the customer to use any particular degree of care in drawing checks.[19]

Under the Negotiable Instruments Law, which has been adopted in almost all of the States, the rule of the law merchant—that an altered instrument is totally void—is changed, and the instrument is enforcible in the hands of a bona fide holder according to its original tenor, though not enforcible as altered.

FOLLOWING TRUST FUNDS.—The whole doctrine of the tracing of trust funds is based upon the assumption that the trust fund can be identified, though possibly it does not remain in the hands of the trustee, and though it may have undergone several transmutations since the wrongful conversion.[1] To invoke this doctrine the *cestui* must be able to identify his property,[2] for as Blackstone says,[3] "It is a principle settled as far back as the time of the Year Books that, whatever alterations of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material." Since it is often difficult to show the identity of the original property in its new form, the courts are very liberal in the sufficiency of identification required of the *cestui* to enable him to trace the trust fund.

Since money has no "earmarks," by which it can be identified, where the trust property consists of money, equity has established certain rules to enable the *cestui* to trace his property.[4] The importance to the *cestui* of tracing the trust funds is that he will be given preference over general creditors of the trustee, and equity will allow him to identify his property upon either one of two theories. The first one of these is that equity conclusively presumes that, although the trustee subsequently draws from his own funds with which are mixed the funds of the *cestui*, he has intended to draw from his own portion thereof rather than from that of the

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[19] Colonial Bank *v.* Marshall, *supra;* Worrell *v.* Gheen, *supra.*

[1] May *v.* Le Claire, 11 Wall. 217; United States *v.* State Bank, 96 U. S. 30.

[2] Primeau *v.* Granfield (C. C.), 184 Fed. 480; In re Mulligan, 116 Fed. 715; Farmers, etc., Bank *v.* King, 57 Pa. St. 202; Baker *v.* New York Bank, 100 N. Y. 31; Ferris *v.* Van Vechten, 73 N. Y. 113.

[3] 2 Bl. Comm. 405.

[4] In Massachusetts the doctrine long obtained that, since money has no "earmarks," there was no way to trace it after it became mingled with other money of the trustee. Howard *v.* Fay, 138 Mass. 104; White *v.* Chapin, 134 Mass. 230; Johnson *v.* Ames, 11 Pick. 173. While it is true that the exact coins or money of the *cestui* can not be identified, nevertheless equity enables the *cestui* to trace his money into the mingled fund and claim either a proportionate part of it or the property which it is invested in. See article by the late Dean Ames of the Harvard Law School, 19 HARV. LAW REV. 511.